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By E-Filing

August 1, 2011

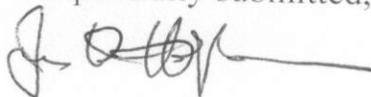
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: FD 35496, Denver & Rio Grande Railway Historic Foundation
Petition for a Declaratory Order**

Dear Ms. Brown:

I am e-filing on behalf of the San Luis & Rio Grande Railroad ("SLRG") its Reply in Opposition to Denver & Rio Grande Railway Historical Foundation's Petition for Declaratory Order submitted in the above-captioned proceeding.

Respectfully submitted,



John D. Heffner

Enclosure

cc: Mr. Donald H. Shank

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FD 35496

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION'S
PETITION FOR A DECLARATORY ORDER**

**REPLY IN OPPOSITION BY
SAN LUIS & RIO GRANDE RAILROAD**

Submitted by
John D. Heffner
John D. Heffner, PLLC
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Suite 200
Washington, D.C. 20006
(202) 296-3334

Due: August 1, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FD 35496

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION'S**

PETITION FOR A DECLARATORY ORDER

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INTRODUCTION

On July 12, 2011, the Denver & Rio Grande Railway Historical Foundation (“DRGHF” or “Petitioner”) filed a Petition for Declaratory Order with the Surface Transportation Board (“the Board”) seeking a ruling that the municipal ordinances and zoning regulations of the City of Monte Vista, CO (“Monte Vista” or “the City”) do not apply to operations and activities that DRGHF is conducting on railroad track and right of way inside the City’s limits. San Luis & Rio Grande (“SLRG”), a duly authorized class III short line railroad that owns the subject track and serves this location, opposes DRGHF’s Petition and requests that this relief be denied inasmuch as DRGHF’s operations at that location do not constitute rail transportation.

STATEMENT OF FACTS

SLRG is a class III short line rail carrier and subsidiary of short line holding company, Permian Basin Railways (Permian”).¹ SLRG was originally incorporated by short line owner RailAmerica, Inc. (“RailAmerica”), to acquire and operate about 149 miles of railroad that the Union Pacific Railroad was selling in 2003.² Permian acquired SLRG from RailAmerica, in a stock acquisition transaction in 2006.³ SLRG’s line extends from an interchange with the Union Pacific Railroad at Walsenburg to South Fork via Alamosa and Monte Vista and from Alamosa to Antonito, all in the State of Colorado. SLRG attaches as Exhibit A a map of its system.

DRGHF is a Colorado not-for-profit corporation owned by an individual named Donald H. Shank. In 1999 DRGHF acquired the western-most extension of the Union Pacific Walsenburg-Creede line between South Fork and Creede through an offer of financial assistance filed in an abandonment proceeding.⁴ While DRGHF purports to provide “rail service” between South Fork and Creede,

¹ Permian is a wholly-owned subsidiary of Iowa Pacific Holdings, a noncarrier short line railroad holding company.

² *San Luis & Rio Grande Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company*, FD 34350, STB served July 18, 2003.

³ *Permian Basin Railways, Inc.—Acquisition of Control Exemption—San Luis & Rio Grande Railroad Company, Inc.*, FD 34799, STB served Jan. 12, 2006.

⁴ *Union Pacific Railroad Company—Abandonment Exemption—in Rio Grande and Mineral Counties, CO*, Docket No. AB-33 (Sub-No. 132X), STB served May 11, 1999.

its activities appear to be limited to storing rail cars and railroad equipment, much of it derelict or inoperative, and operating “excursions” using a self-propelled motor car. No revenue producing common carrier freight or passenger service has ever been provided by DRGHF on this line to the best of SLRG’s knowledge.

This Petition concerns a short piece of right of way and track that are located at Monte Vista, approximately 30 miles distant from DRGHF’s “railroad” at South Fork. In other words, the track that is the subject of this Petition is *physically disconnected* from the rest of DRGHF’s track. The track traverses a 1.84 acre parcel of land that Donald Shank purchased through his company Rio Grande Southern Railroad Company, LLC (“RGS”), and which that entity in turn leases to its affiliate DRGHF. Furthermore, the subject track is actually owned by SLRG and abuts its mainline through Monte Vista. SLRG attaches to this pleading as Exhibits B and C a copy of the deed conveying the parcel to RGS and a diagram showing the placement of the track on that property. The deed explicitly reserved to SLRG the ownership of all existing trackage within the sale area along with an exclusive operating easement thereover. [emphasis supplied]. It has been used by DRGHF or Donald Shank without SLRG’s permission and SLRG has asked them to vacate this property. *See*, letter from SLRG Vice President Todd Cecil attached

as Exhibit D.⁵ To the best of SLRG’s knowledge and belief, DRGHF/Shank have been using this track to store derelict and or inoperative rail equipment rather than providing anything in the nature of common carrier transportation at this location. *See*, select photographs of equipment stored on RGS’ property in Monte Vista attached as Exhibit E.

Recently SLRG has learned that the City has instituted criminal proceedings against the Petitioner to force him to cease his activities as violations of its ordinances and zoning laws.⁶ SLRG supports the City in its efforts to require compliance by Petitioner with its laws.

ARGUMENT

The basic question that this Petition presents is whether Petitioner’s activities on the subject rail spur constitute “rail transportation” entitling it to obtain a ruling that City laws are preempted. SLRG believes the answer is clearly “no.” Accordingly, there is no need for the Board to issue a ruling here.

⁵ Mr. Cecil was formerly employed by RailAmerica but has been an employee of Permian and its subsidiary SLRG since 2009.

⁶ The timing of the Petition coincides with the fact that the Petitioner was convicted in the Municipal Court of the City of Monte Vista on April 1, 2011, in case #2010-0936 for the unlawful storage of railcars upon commercially zoned property in the City, in violation of Monte Vista municipal code, section 12-17-110 (3) and (5). Petitioner’s owner Donald H. Shank was sentenced on May 18, 2011, to serve 30 days in jail and a \$1,000 fine for his willful violation of the municipal code. The Petitioner has appealed his conviction to the Rio Grande County District Court, under docket #11CV29. At the time of this Response, the Appellant’s *Brief* is due on August 22, 2011.

As a general matter, the Board has the discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty under 5 U.S.C. §554(e) and 49 U.S.C. §721. *San Luis & Rio Grande Railroad-Petition for a Declaratory Order*, FD 35380, STB served Aug. 12, 2010. However, the Board will not do so when the law is clear as it is here. *Town of Milford*, FD 34444, STB served Aug. 12, 2004 (cited as *Town of Milford*) and *James Riffin-Petition for Declaratory Order*, FD 34997, STB slip op. at 4, served May 2, 2008.

49 U.S.C. §10501 provides that the jurisdiction of the Board over the *transportation by rail carriers* [emphasis supplied] with respect to their services and facilities is exclusive and preempts any other remedies under federal or state law. However, for an entity or an activity to come within the scope of federal preemption two elements must exist. First, the activity must constitute “transportation” as that activity is defined in the ICCTA. Second, the party seeking preemption must be a “rail carrier” as defined in the ICCTA. *James Riffin-Petition for Declaratory Order*, FD 34997, STB slip op. at 5, served May 2, 2008 (cited as *Riffin*), and cases cited therein, discussed at pages 8-10, *infra*. DRGHF’s activities in Monte Vista fail both aspects of this test. Accordingly, it has no right to preemption from the otherwise applicable laws of the City.

DRGHF would have the Board believe that it satisfies the first element of the preemption criteria insofar as it is arguably a class III short line railroad due to

its ownership of the line between South Fork and Creede. However, to claim preemption agency precedent holds that the petitioning railroad must be engaged in providing rail transportation or activities closely related thereto and not unrelated matters such as manufacturing or equipment storage. *Town of Milford, supra*, at 2.

Indeed the statute defines “transportation” as including:

a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and services related to that movement. 49 U.S.C. 10102(9).

While Petitioner’s facility and activities might superficially appear to fall within the ambit of this provision, they do not involve the movement of passengers or property in any sort of common carrier rail service. Furthermore, the Board has found that to be a carrier, a petitioner must hold itself out to provide for hire transportation to the public for compensation upon reasonable request. *Riffin, supra*, at 1-2. Petitioner’s operations between South Fork and Creede appear to entail some sort of excursion service using a crude self-propelled vehicle rather than standard railroad equipment. SLRG also understands that at times Petitioner has allowed individuals access to its lines using self-propelled vehicles known as “speeders.”

By contrast, DRGHF is not conducting any sort of rail service, excursion or otherwise, at Monte Vista. Nowhere in its Petition does Petitioner allege that it is

providing or seeks to provide rail transportation at its Monte Vista facility. In fact, the equipment depicted in the pictures attached in Exhibit E does not appear to be capable of being used in interchange service inasmuch as they are made of wood and lack wheels! Rather DRGHF appears to be using the subject property without SLRG's permission for storing and perhaps repairing railroad equipment. The facility seems to be a cross between a repair shop and a flea market for railroad equipment. It is also unclear whether this facility is even used to repair or store equipment operated on DRGHF's South Fork to Creede line. Moreover, courts have held that nonrailroads leasing and operating facilities on property owned by and leased from railroads are not entitled to claim any sort of preemption right. *See, Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F3d, 1324, 1327 (11th Cir. 2001), [where the Court used an "economically integral" test (i.e., whether the local regulation impacts the rail carrier in an "an economically meaningful way") to find that the City's regulation of an aggregate distribution business operated by the lessee of a railway was not subject to ICCTA pre-emption].

The situation here does not present the first time the Board has addressed the question of whether an entity storing and perhaps repairing railroad cars and related equipment is entitled to claim preemption. The Board addressed this very issue in a whole series of cases initiated by or involving an individual named

James Riffin. *See, Riffin, supra; James Riffin-Petition for Declaratory Order*, FD 35245, STB served Sept. 15, 2009, and *James Riffin-Petition for Declaratory Order*, FD 34997, STB served July 13, 2011 (on remand from the D.C. Circuit).⁷

These cases appear to be right on point and dispositive of Petitioner's claim. As here, Riffin had acquired a rail line authorized for abandonment by the Board through an offer of financial assistance. He also owned a facility located in Cockeysville, MD, on a noncontiguous rail line that he was attempting to acquire and was seeking a Board ruling that his activities at that facility were preempted from the application of state and local environmental laws. He had constructed and was using that facility to store some sort of maintenance of way equipment not unlike what DRGHF seeks to do in Monte Vista. Maryland state and local authorities sought to enjoin Riffin's activities in connection with the construction and operation of the Cockeysville facility until he had obtained the required permits and authorities. Riffin sought a ruling that his status as the owner of a rail line elsewhere in the State preempted the application of state and local laws under the ICCTA. In response the Board denied his requested relief. As pertinent here, the Board ruled that:

⁷ Collectively cited as the *Riffin decisions*.

- To be a carrier entitled to preemption, a petitioner must hold himself out to provide for hire transportation to the public for compensation upon reasonable request;
- To come within the Board’s jurisdiction entitling it to claim preemption an entity’s activity must constitute “transportation” and be performed by or under the auspices of a “rail carrier;”
- Transportation is defined to include a facility related to the movement of property by rail and the facility must be closely related to and part of a railroad’s ability to provide direct rail service;
- The fact that the petitioner might be a carrier at another, disconnected location does not render it a railroad elsewhere if it could not operate as a rail carrier on the subject line. If anything, The Board regarded Riffin as a mere “shipper” at Cockeyville;

See, the Riffin Decisions, supra [slip op. served May 2, 2008, at 1-2, and 5; slip op. served Sept. 15, 2009 at 5; slip op. served July 13 at 4.

Even assuming that DRGHF’s activities could be seen in some farfetched way to constitute some sort of “transportation by a rail carrier” and therefore entitled to preemption, that relief would still not be available here. The Board has long taken the position that certain types of state and local regulation involving public health and safety are not preempted. The critical distinction as to what may

or may not be preempted is whether the law at issue is being applied so that it restricts a railroad from conducting its common carrier operations or unreasonably burdens interstate commerce. *Joint Petition for Declaratory Order-Boston and Maine Corporation And Town of Ayer, MA*, FD 33971, STB slip op. at 7-13, served May 1, 2001 (where the Board provided general guidance as to what activities may or may not be preempted). The Court have held that a "state" law that affects rail carriage survives pre-emption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage. "State" regulations do not discriminate against rail carriers if they "address state concerns generally, without targeting the railroad industry." *New York Susquehanna & W. Ry. Corp v. Jackson*, 500 F3d 238, 242 (3rd Cir. 2007).

CONCLUSION

In short it is clear that DRGHF's activities at Monte Vista cannot be regarded as "rail transportation" entitling it to preemption relief from local laws by any stretch of the imagination. It is patently obvious that there is no uncertainty here requiring the initiation of a declaratory order proceeding. The Board should promptly issue a ruling denying DRGHF's Petition and allowing the City to take any and all action it deems appropriate.

Respectfully submitted,


John D. Heffner

John D. Heffner, PLLC

1750 K Street, N.W.

Suite 200

Washington, D.C. 20006

(202) 296-3334

Due: August 1, 2011

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certifies that I have mailed a copy of the “Reply in Opposition by San Luis & Rio Grande Railroad” to the following party by first class U.S. mail this 1st day of August 2011:

Mr. Donald H. Shank
Rio Grande Southern Railroad Company, L.L.C.
20 N. Broadway St.,
Monte Vista, CO 81144

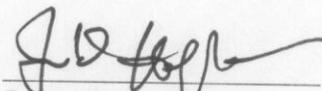

John D. Heffner

EXHIBIT A

San Luis & Rio Grande Railroad

-  SLRG / San Luis & Rio Grande Railroad / RGSR Rio Grande Scenic Railroad
-  SLRG San Luis & Rio Grande Railroad
-  SLRG Trackage Rights
-  BNSF BNSF Railway
-  SLC San Luis Central
-  UP Union Pacific



Central Car Repair Facilities

Connections: SLRG with UP at Walsenburg, CO
 SLRG with SLC at Monte Vista,
 CO (Sugar Jct.)



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 Austin, Texas 78720 (512) 346-9330 <http://www.deskmap.com>

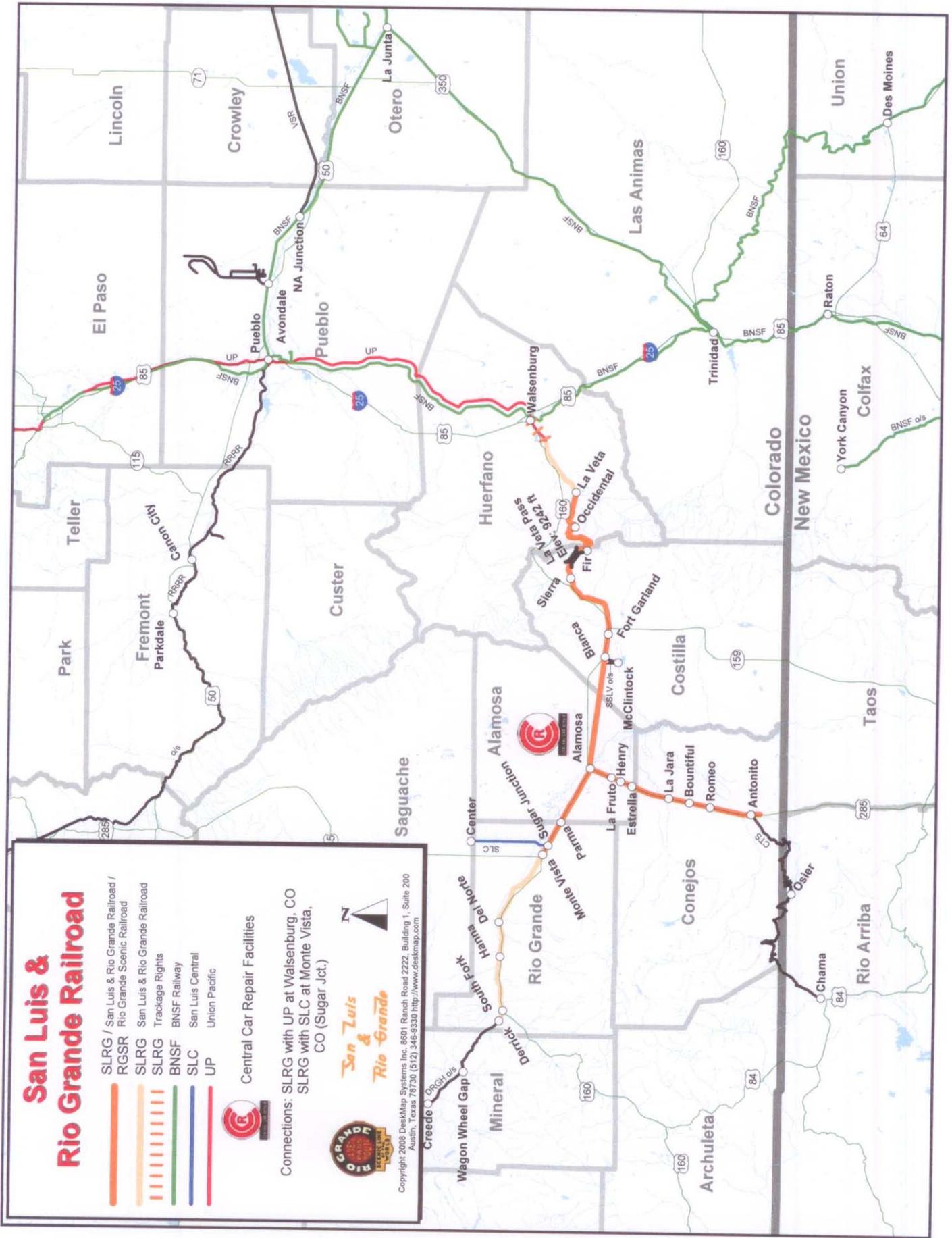


EXHIBIT B

EXHIBIT "B"

A tract of land located in the SW1/4 of the NW1/4 of Section 31, T. 39 N., R. 8 E., N.M.P.M., City of Monte Vista, Rio Grande County, Colorado, which tract is more particularly described by metes and bounds as follows, to-wit:

Beginning at the southwest corner of the tract herein described, being the point of intersection of the east right of way limit of U.S. Highway No. 285 (a.k.a. Broadway), with the southwesterly right of way limit of the San Luis and Rio Grande Railroad, Inc., a point on the north line of that certain tract described in Book 243 at Page 123 of the records in the office of the Rio Grande County Clerk and Recorder, whence the West Quarter Corner of said Section 31 bears S. 15°05'09" W., 138.06 feet distant; thence N. 00°24'00" E., 203.92 feet along the east right of way limit of said highway to the northwest corner of the tract herein described, which corner is 20.00 feet perpendicular from the centerline of the main track of said railroad; thence S. 62°05'00" E., 681.63 feet along a line parallel with and 20.00 feet southwesterly of said centerline, to its point of intersection with a line which is 8.50 feet southerly of the centerline of Spur Track ICC No. 15 of the San Luis and Rio Grande Railroad, serving the Monte Vista Milling and Elevator Company and intermediate industrial installations as said spur is now located and constructed, which point of intersection is the southeasterly corner of the tract herein described; thence along a line parallel with and 8.50 feet southerly of said spur, 93.07 feet on the arc of a non-tangent curve to the left, having a radius of 363.73 feet, the long chord of which curve bears N. 80°08'16" W., 92.82 feet; thence continuing along said line, 100.00 feet on the arc of a non-tangent curve to the left, having a radius of 2149.50 feet, the long chord of which curve bears N. 88°48'02" W., 100.00 feet to its point of intersection with the easterly right of way limit, extended, of Washington Street; thence West, 80.00 feet to the west right of way limit, extended, of Washington Street; thence South, 35.98 feet along said west right of way limit to the easterly extension of the north line of Lot 17, Block 1 of the original Town of Monte Vista; thence West, 75.06 feet along the easterly extension of the north line of said Lot 17 to its point of intersection with the east line of that certain tract of land described in Sheriff's Deed recorded in Book 518 at Pages 1921-1922 of the records in said office; thence North, 35.18 feet along the east line of said tract (Bk. 518, Pgs. 1921-22) to the northeast corner thereof; thence West, 72.23 feet along the north line of said tract (Bk. 518, Pgs. 1921-22), to a point on the southwesterly right of way limit of said San Luis and Rio Grande Railroad; thence N. 62°05'00" W., 48.87 feet along said southwesterly right of way limit to the east corner of said tract of land described in Book 243 at Page 123 of the records in said office; thence continuing N. 62°05'00" W., 160.51 feet along the southwesterly limit of said right of way and the northeasterly boundary of said tract (Bk. 243, Pg. 123) to the point of beginning. Containing 1.84 Acres, more or less.

The parcel herein above described is SUBJECT TO any and all existing easements and/or rights of way of whatsoever nature.

This description was prepared by David L. Maley, a duly registered land surveyor in the State of Colorado, Certificate Number 23894 and is based solely of record information compiled from the deeds and surveys of adjacent properties and does not represent the results of a field survey.

STATE OF TEXAS)
) SS:
COUNTY OF BEXAR)

Before me, the undersigned, a Notary Public in and for said County, this 29 day of March, 2005, came Todd N. Cecil, Vice President, on behalf of San Luis & Rio Grande Railroad, Inc. and acknowledged the execution of the foregoing instrument.

Witness my hand and official seal.

Kelly C. Houston

Printed Name Kelly C. Houston

Residing in Bexar County, TX

My Commission Expires:

April 30, 2006

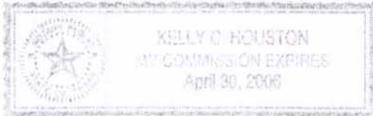


EXHIBIT C

EXHIBIT D



San Luis & Rio Grande Railroad

118 S. Clinton St.

Suite 400

Chicago, IL 60661

- 1) SENT BY REGULAR U.S. MAIL
- 2) SENT VIA ELECTRONIC MEDIA TO: dhshank@yahoo.com

July 22, 2011

Mr. Donald H. Shank
20 North Broadway Street
Monte Vista, CO 81144

Re: Railroad track at Monte Vista, CO

Dear Mr. Shank:

As you are aware, in March, 2005, San Luis & Rio Grande Railroad ("SLRG") sold Rio Grande Southern Railroad Company, LLC approximately 1.84 acres of land located along the east side of U.S. Highway 285 (Broadway), along the south side of SLRG's main line track, at Monte Vista, Colorado (the "Sale Premises"). Attached is a copy of the deed which effectuated this transaction. The survey used in this transaction is attached as the last page of this deed.

Language in this deed specifically reserved to the SLRG ownership in and to the track located within the Sale Premises, along with exclusive rights to use this trackage. However, over recent months, despite requests made by SLRG to remove your railroad equipment from these tracks, you have refused to do so.

Please accept this letter as SLRG's final request that you immediately remove all railroad cars and other railroad equipment from this track. Your failure to do so will result in further action to be taken by SLRG to enforce its exclusive rights to use of this trackage.

Should you have any questions, please do not hesitate to contact me by calling (210) 844-4621.

Sincerely,

Todd N. Cecil
Vice President – Real Estate Development

Cc: Mr. Matthew Abbey
Mr. Ed Ellis

EXHIBIT E

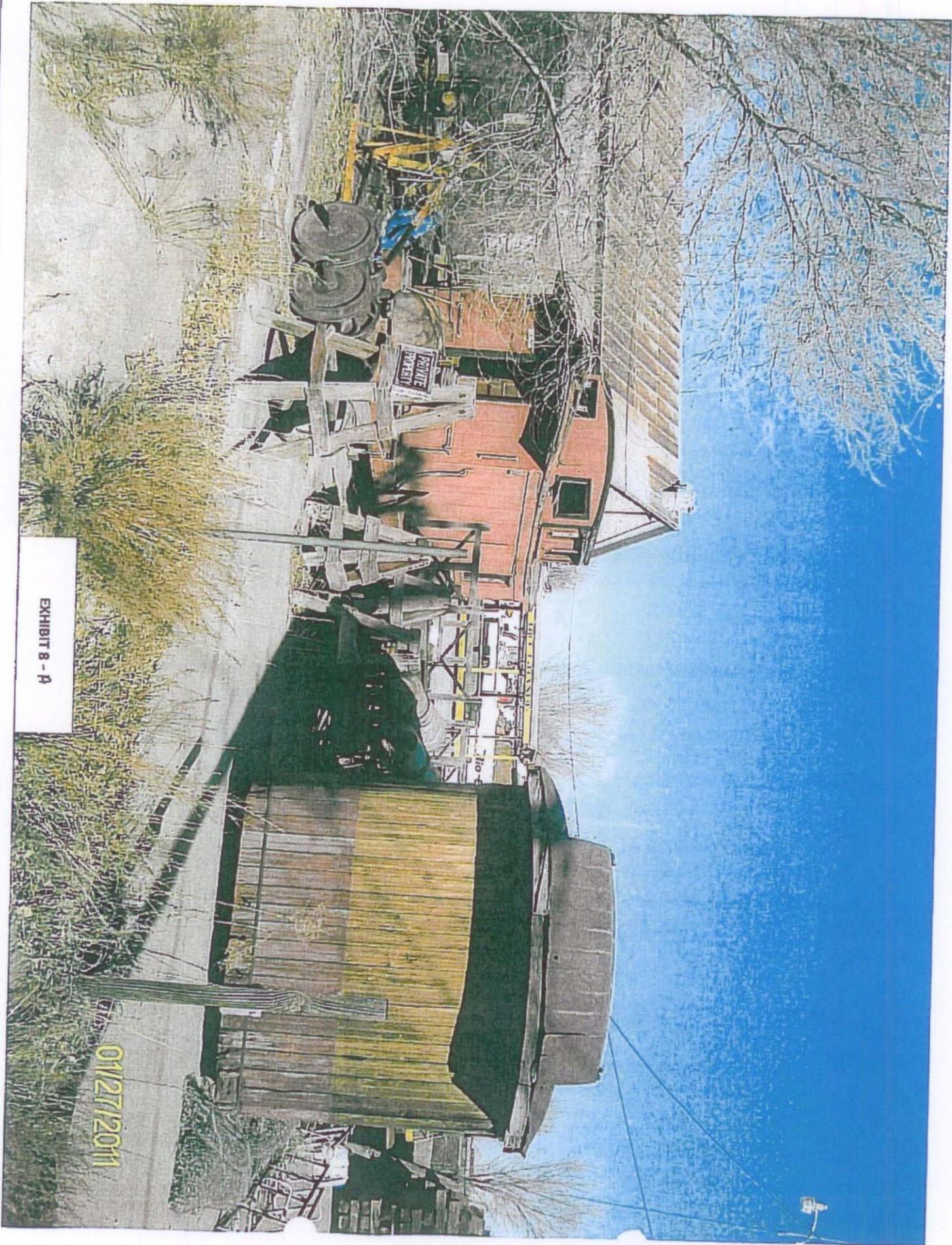


EXHIBIT 8 - 14



EXHIBIT 8-f

01/26/2011



EXHIBIT 8 - 2

01/26/2011

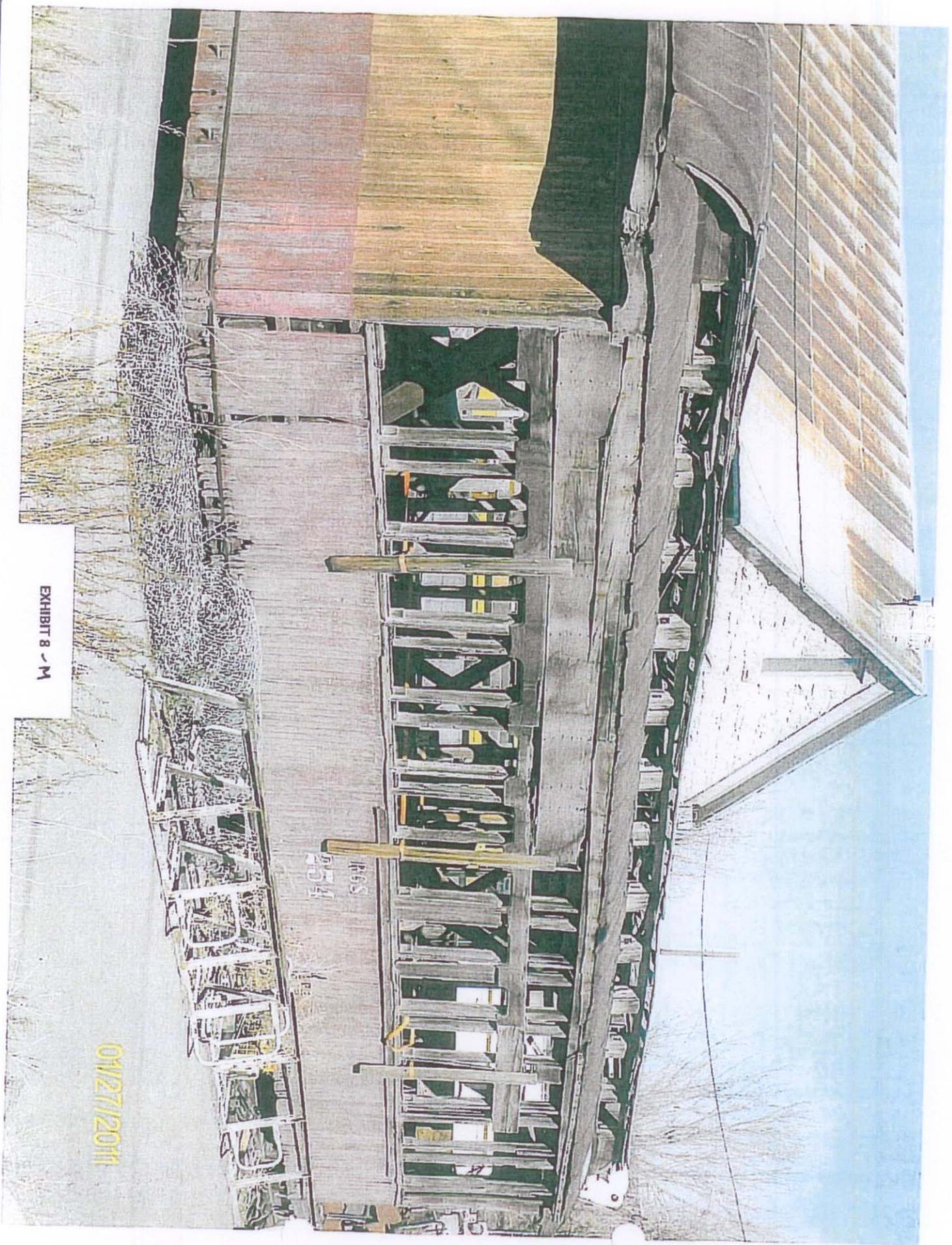


EXHIBIT 8 - M

01/27/2011

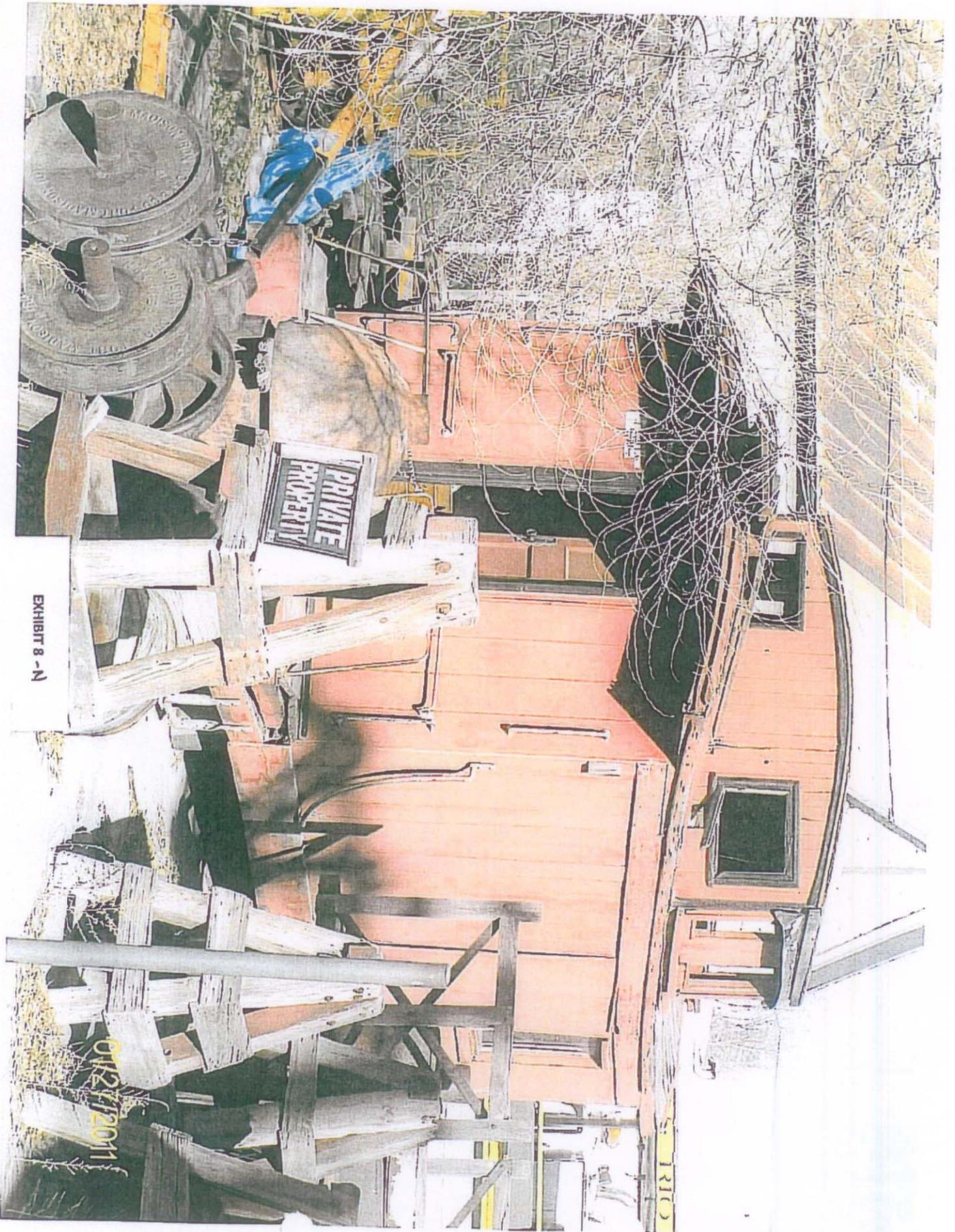


EXHIBIT 8 - N

01/27/2011